No. 2586

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY OLIVER,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. W. HUTTON,
Attorney for Plaintiff in Error.

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Statement of Facts.

Plaintiff in error was indicted and tried for an assault with intent to commit rape upon the person of one Mary Elizabeth Young, upon the steamship "Beaver", was found guilty and sentenced to four years' imprisonment at McNeil's Island, where he now is.

The complaining witness testified that she took passage on the "Beaver" at Portland, Oregon, for a voyage to San Francisco, as a cabin passenger, accompanied by her daughter, and they were assigned to room 73; that after the vessel had passed over the Columbia River bar, she then being in a

social hall on the upper deck, it became rough and she went down some steps in the after part of the vessel to the deck where her room was located, and as she went down the steps the defendant met her and assisted her to her room, her daughter then being in the room, but leaving immediately and not returning to the room or to her mother until the arrival of the vessel in San Francisco; she then claims the defendant left the room and shortly afterwards a man named Raphael went to the room and took some liberties with her; that defendant returned after Raphael left; that Raphael went back to the room again after defendant left, and afterwards at about 11 p. m. he again returned, locked the door, took off some of his clothes, got into her berth and attempted to have sexual intercourse with her; that after a time she became faint, and defendant then got up, lit a cigarette and finally left the room; she also testified that later on a man named De Brau went to the room and accomplished the act of sexual intercourse with her.

It is in evidence in the case that the room where the occurrences testified to by the witness are claimed to have happened, was a room about seven feet one way and eight the other, and was one of a cluster of four rooms that were constructed out of what is called tongue and grooved boards, that people occupied all of the surrounding rooms, that the complaining witness made no outcry whatever, that several watchmen and officers visited that part of the ship at frequent intervals during the night;

that there was a nightwatchman, De Brau, there to answer any call from an electric bell with which each room was provided, that the complaining witness had rung the bell once at least during the night, but did not at this time or after Oliver left, but that in the morning she made a complaint first to a lady passenger in a room across the lower part of a hall, the door of which room was constructed of what is called latticework, the door being immediately opposite the door to Mrs. Young's room, the hall being about three feet wide. Raphael was a waiter on the vessel, Oliver the porter, and De Brau the saloon nightwatchman.

Argument.

I.

PLAINTIFF IN ERROR WAS CONVICTED OF A COMMON LAW CRIME.

All Congress has ever done with relation to either the crime of rape or assault with intent to commit rape is to fix the punishment, as follows:

> Penal Code, Sec. 276: "Whoever shall assault another with intent to commit a murder or rape, shall be imprisoned not more than twenty years."
>
> Sec. 278: "Whoever shall commit the crime of rape shall suffer death."

Congress not having defined *the acts* necessary to constitute the crime of rape, the United States Attorney, was, of course, obliged to *allege acts* con-

stituting the crime as he believed it existed at common law, and defendant was of necessity convicted of a common law crime, or what the United States Attorney believed to be the crime at the common law. Our contention is, that the *acts* constituting the crime, must be defined by Congress or no crime exists.

A demurrer was interposed to the indictment, which was overruled.

The power of Congress to *create* crimes exists by virtue of Section 8 of Article I of the Constitution of the United States. Subdivision 10 of Section 8 reads:

> "To *define and* punish piracies and felonies committed on the high seas, and offenses against the law of nations."

This matter has received the attention of the United States Supreme Court several times, the first time in the case of

United States v. Hudson, 7 Cranch 31,

and the court there says:

> "The only question which this case presents is, whether the circuit court of the United States can exercise a common-law jurisdiction in criminal cases. We state it thus broadly, because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute. Although this question is brought up now, for the first time, to be decided by this court, we consider it as having been long since settled in public opinion. In no other case, for many years, has this jurisdiction been asserted; and the general acqui-

escence of legal men shows the prevalence of opinion in favor of the negative of the proposition."

Page 32:

"The legislative authority of the Union must first make *an act* a crime, affix a punishment to it, and then declare the court that shall have jurisdiction of the offense."

That case was decided February 13, 1812.

In 1813, the case of United States v. Coolidge, 1 Gallison 488, came up before Justices Story and Davis. The case was exactly like this. The syllabus reads:

"Whether the Circuit Court of the United States has jurisdiction over common law offences against the United States."

The decision commences:

"The simple question is, whether the Circuit Court of the United States has jurisdiction to punish offences against the United States, which have not been previously *defined,* and specific punishment affixed, by some statute of the United States."

On page 490 the decision reads:

"The court then having complete jurisdiction, the next point will be to ascertain, what are crimes and offences against the United States. And here I contend, that recourse must be had to the *principles* of the common law, taken in connection with the constitution; in order to *fix* the definition, precisely as in other laws of Congress, we resort to the rules of the common law to give them an interpretation. For instance, Congress has provided for the

> punishment of murder, manslaughter and perjury, under certain circumstances; but it has nowhere defined these crimes. Yet no doubt is ever entertained on trials, that the explanation of them must be sought and exclusively governed by the common law; and upon any other supposition, the judicial power of the United States would be left, in its exercise, to the mere arbitrary pleasure of the judges, to an uncontrollable and undefined discretion."

The learned judge on page 495, refers to the case of United States v. Hudson, and intimates that his decision is made for the purpose of again bringing the matter up before the Supreme Court. His Honor Justice Davis did not concur in the decision for that purpose, and the matter went to the United States Supreme Court.

In that court it appears from the proceedings that the matter was considered definitely settled by the case of United States v. Hudson; no argument was made; the decision was rendered March 21, 1816. See United States v. Coolidge, 1 Wheaton 415.

The United States Supreme Court said in that decision that it adhered to its ruling in United States v. Hudson, heretofore mentioned; which decision requires that the crime must be *defined*, etc. It disagreed with Judge Story's reasoning and reversed the decision.

Congress thereafter defined all crime, except the crime of "rape upon the high seas"; that seems to have been overlooked; and no decision of the United States courts can be found where a man has

been punished for crime unless the crime has been previously defined by Congress. Many decisions can be found and are below cited where demurrers to the indictments have been sustained because the crime had *not* been defined.

We respectfully call the court's attention to the footnote in U. S. v. Worrall, 2 Dallas 384; and also United States v. Reese, 92 U. S. 216.

> "If Congress has not declared *an act* done within a statute to be a crime against the United States, the courts have no power to treat it as such."
>
> Page 220. "Every man should be able to know with certainty when he is committing a crime."

U. S. v. Britton, 108 U. S. 206.

> "There are no common-law offenses against the United States, United States v. Hudson, 7 Cranch. 32, United States v. Coolidge, 1 Wheaton 416, and section 5204 does not of itself create any offense against the United States."

Manchester v. Mass., 139 U. S. 262.

> "And the courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by Congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the United States is wholly derived from the statutes of the United States."

Jones v. United States, 137 U. S. 211.

> "In either case, the crime, the punishment and the procedure are statutory, the whole criminal jurisdiction of the United States being derived from acts of Congress."

U. S. v. Eaton, 144 U. S. 687.

"It is a principal of criminal law that an offense which may be the subject of criminal procedure, is *an act* committed in violation of a public law, either forbidding or commanding it."

In re Kollock, 165 U. S. 526-533.

"We agree that the courts of the United States in determining what constitutes an offense against the United States, must resort to the Statutes of the United States made in pursuance of the constitution. * * * "

Tennessee v. Davis, 100 U. S. 275.

"That the legislative authority of the Union must first make *an act* a crime, affix a punishment to it and prescribe what courts have jurisdiction of such an indictment."

In Peters v. United States, 36 C. C. Ap. 105, decision by Judge Hawley, concurred in by Justices Ross and Morrow, this court says on page 109:

"It must be borne in mind that the national courts do not resort to common law as *a source* of criminal jurisdiction. Crimes and offenses cognizable under the authority of the United States can only be such as are expressly designated by law. It devolves upon congress to define *what are* crimes, to fix the proper punishment, and to confer jurisdiction for their trial. U. S. v. Walsh, 5 Dill 50, 60 Fed. Cas. No. 16,634; U. S. v. Martin, 4 Cliff 156, Fed. cases No. 15,728; In re Green, 52 Fed. 101; Swift v. Railroad Co., 64 Fed. 59; U. S. v. Hudson, 7 Cranch 32; U. S. v. Coolidge, 1 Wheaton 415; U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 531."

See also,

U. S. v. Benson, 70 Fed. 591, decision by Judge Hawley concurred in by Judge Gilbert.

It is more necessary for the legislature to define the crime than it is to affix the punishment, as without a definition of the crime, no one could tell whether the act was a crime or not; punishment might be in a general statute, or section of the penal code, referring to other sections where the crime was created, and the act or acts constituting the crime prohibited. Rape has always been a statutory offense; the statutes of the different states *vary* as to what constitutes the crime, and they frequently vary in each state according as its legislature meets, that is particularly the case in California.

U. S. v. Hall, 98 U. S. 343-345;
U. S. v. Dietrich, 126 Fed. 678;
U. S. v. Martin, 176 Id. 111;
U. S. v. Lewis, 36 Id. 449.

Every person is presumed to know what the statutory law of the country in which he resides is, but he is not presumed to know what the statutory law of another country is, and he is certainly not presumed to know what the statutory law of England of centuries ago was.

Occasionally in text books, and sometimes in matter of dictum in some decisions, and in some state court decisions we find, that when a crime is named,

the courts may go to the common law for the definition of the crime; that has never been the law of the United States as abundantly appears by the foregoing decisions, the last expression of opinion by the U. S. Supreme Court being in re Kollock, 165 U. S. 526.

It follows from the foregoing that the crime of rape upon the high seas does not exist, and of course if the crime does not exist, there can be no such offense as an assault with intent to commit the crime.

There are a class of crimes such as burglary, which is committed when a person makes an unlawful entry with the intent to commit the crime of larceny or any other felony, in which it is not necessary to define what constitutes larceny, or in piracy where upon the high seas under certain conditions a person commits the crime of murder or robbery; that is to say where the commission of one crime is a part of an act necessary to commit another crime, in which it is not necessary to define the crime which the act which is a part of the crime defined; but nowhere in the United States Reports can any case be found where a crime is directly charged, that it has been held it is not necessary to define it.

The nearest that can be found are the cases of

United States v. Palmer, 3 Wheaton 610, and
United States v. Smith, 5 Wheaton 153.

Piracy was charged in both of those cases.

The commission of the crime of murder or robbery upon the high seas the commissions of which in some cases are necessary to constitute piracy without the statutory definition of the crime of piracy, would not make a man a pirate; piracy and burglary are both defined crimes, and their definition is necessary to make them such.

Both of the above cases are largely the foundation for what may be found in other authorities to the effect that the common law may be resorted to for a definition of a criminal offense; and examination shows they cannot be so used.

In both of those cases the question was largely whether the crime of piracy was properly defined, when Congress defined piracy and mentioned other crimes such as robbery and murder, without defining in the law defining piracy what robbery and murder was in the case of U. S. v. Palmer.

Chief Justice Marshall said:

> "Yet it seems difficult to resist the conviction, that the legislature considered murder and robbery as *acts* of piracy."

Mr. Justice Johnson says, that Congress had created two classes of offenses subdivided into two subdivisions, in one,

> "Each crime is *specifically* described, in the ordinary mode of defining crimes, and so far the constitutional power of defining and pun-

> ishing piracies and felonies on the high seas, is strictly complied with."

In the other, the legislature *referred* for a definition to other sources, to wit:

> "If any person shall commit, upon the high seas, &c., murder or robbery or any other offense, which if committed in the body of a county, would be punishable with death. * * *"

That law at least referred to the *sources* of information to ascertain *what* robbery was; in the law in this case we have nothing but the penalty; but as was held, the crime of robbery and murder were but *acts* to constitute another crime, that of piracy, and the U. S. Supreme Court in the subsequent case of United States v. Smith, supra, said:

> "To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done, either by a reference to crimes having a technical name, and determinate extent, or by enumerating the *acts* in detail, upon which the punishment is inflicted."

Supposing all that Congress had done in that case is what appears in this, simply said,

> "Whoever shall commit the crime of *piracy* shall suffer death."

There can be no doubt as to what the decision of the Supreme Court would have been in both of those cases.

II.

THE EVIDENCE IN THIS CASE DOES NOT SHOW THE CRIME OF ASSAULT WITH INTENT TO COMMIT RAPE WAS COMMITTED.

The prosecuting witness testified that Oliver went to her room, took off some of his clothes, got into the berth with her, and tried to have sexual intercourse; she then testified (page 25 of transcript):

> "I don't remember anything else. I resisted him, I could not remember anything else now just exactly what I did. I had one hand and I just pushed him like that, and he had my head and this arm down, and I could not say whether it was the right or left hand, I am not sure now, I did all I could that my little strength would allow me to keep the sheet around me, I could not get my clothes down here. I did not fight at all. I appealed to his better nature to leave me alone. That I am respectable and a mother of a family and I thought he would surely leave me alone when I would tell him that. He did not go away, he kept right on, for about ten minutes. I finally got exhausted and told him I am going to faint. He says, 'You are kidding', I says, 'No, I am not, hurry please, and get me something'. Then he got up, swore at me, he swore at me before he got up."
>
> (Page 27). "I became completely exhausted and if Mr. Oliver had wanted to force me to have sexual intercourse with him I could not have resisted."

The most the evidence shows was a simple assault; the prosecuting witness admits that defendant *could* have accomplished his purpose as far as any resistance on her part was concerned; she was in the

possession of all her faculties, her voice she did not use, she claims a sheet became wrapped around her, and all she did was to use one hand, the other hand being under her head. There is nothing in the whole record to show that Oliver could not have accomplished sexual intercourse if he had intended it; no threats were used. It is true she claims Oliver told her it was no use to cry out as it would do her no good—the first thing a woman would have done under such a statement would be to cry out—and in conclusion the witness testified that Oliver could have accomplished sexual intercourse with her as far as anything she could have done would have prevented him. Where, then, is there any evidence of an intent to have sexual intercourse at all events?

In Russell on Crimes, the author gives the definition of an assault with intent to commit rape, quoting from Rex v. Lloyd, 7 Car. & P., 318:

> "In order to find the prisoner guilty of an assault to commit rape you (the jury) must be satisfied that the prisoner, when he had hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part."

In this case resistance ceased, if there ever was any; the evidence seems to show that what resistance there was, was equivocal. Mrs. Young did not cry out; if she had, instant relief would have been afforded. In the following cases the evidence

was much stronger than in the case at bar, and it was held insufficient:

People v. Brown, 47 Cal. 447;
People v. Manchego, 80 Id. 306;
People v. Fleming, 94 Id. 308.

The latter is a well considered case, with quite a review of the authorities.

In the above case of People v. Manchego, the Supreme Court says, on page 307, quoting from a Texas case:

> "Obviously, there is a manifest distinction between an assault to commit a rape and an assault with intent to have an improper connection. Any such violent or indecent familiarity with the person of a female against her will, where the latter is the extent of the purpose and intent of the aggressor, is an aggravated assault, and should be punished as such."

The United States Supreme Court had occasion to consider a case of rape in

Mills v. United States, 164 U. S. 645.

There the evidence was much stronger than it is in this case, and it was held insufficient.

For the same reason, the court erred in refusing to give the following instructions (pages 52-53, 67 of record):

> "If you find from the evidence in this case, that the defendant Harry Oliver made an assault at the time and place charged in the indictment upon the person of Mary Elizabeth Young, with the intent on his part to have forcible sexual intercourse with her, and that she resisted him until she was no longer able

to resist, or that she became exhausted, and that thereupon, or at the happening of either of such events the said Harry Oliver, defendant, voluntarily abandoned further effort without accomplishing such sexual intercourse, I then charge you that the said defendant is not guilty of the crime of an assault with intent to commit rape.

"There is a wide distinction between an assault with intent to commit rape, and an assault with intent to have an improper connection. There can be no intent to commit rape unless a defendant is resolved to use all force necessary and at all events to carry out his designs. Therefore, if you find from the evidence in this case that the defendant Harry Oliver sought to have sexual intercourse with Mary Elizabeth Young, named in the indictment, and could have accomplished his purpose by the use of force, but that at the time resistance on the part of said Mary Elizabeth Young, if such resistance there was, became overcome, and the said defendant by persisting in his endeavors and by the use of force could have had such sexual intercourse, but voluntarily withdrew and refrained from further effort, I then charge you that the defendant is not guilty of the crime charged in the indictment."

The first instruction given by the court did not cure the failure to give the above instructions, as we find in it the following:

"There is a wide distinction between an assault with intent to commit rape and an assault with intent to have improper connection by means of persuasion, blandishments, etc., but without the use of force."

Force could be used to obtain consent, and under the decisions the offense would be simple assault or battery.

III,

THE PROOF OF THE NATIONALITY OF THE "BEAVER" WAS INSUFFICIENT.

Section 272 of the Penal Code, requires that the vessel on which the act is alleged to have occurred, must have been committed

> "* * * on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof."

The crime in this case is alleged to have been committed on or about April 12, 1914; the trial took place July 13th and 14th following. The only testimony on the ownership of the vessel is that of A. G. Ravenhill, who testified (page 31):

> "I am purser on the steamer Beaver. I was such on April 12th, 1914. The Oregon-Washington Railroad & Navigation Company *owns* that vessel, that *is* an American corporation. That *is* an American vessel, flying the American flag. On the night of April 12th we were in American waters, off the coast of Oregon, etc."

We submit that showed ownership as on the July 13th, and not on April 12, 1914.

It will probably be argued by the United States Attorney, that the vessel would not have made the

trip from Portland to San Francisco unless she had been an American vessel. In other words, as it is unlawful for a *foreign* vessel so to do, it must be presumed that the law was not violated, and upon that, base the presumption that the vessel was either owned by an American citizen or an American corporation.

That is simply basing a presumption upon a presumption, which the law does not permit.

United States v. Ross, 92 U. S. 283-284.

It is a matter of common knowledge, however, that foreign vessels frequently carry passengers between domestic ports of the United States, and are content to pay a fine as a penalty for so doing.

It is the law in cases of removal of a cause from a state to a United States court that the affidavit must set forth, not only that the defendant is a citizen of another state or country as the case may be at the time of the making of the affidavit, but that he *was* at the time the case was commenced.

Dalton v. Germania Ins. Co., 118 Fed. 936.

A number of cases have been decided by the Supreme Court of the State of California, where an affidavit of service of summons has been questioned, the law requiring that the server shall be over the age of eighteen years at the time of service, and the affidavit has pointed to the time of *the making of the affidavit,* and not *to the time of*

service. In each case the judgment has been set aside. See,

Howard v. Galloway, 60 Cal. 10;
Weil v. Bent, id. 604;
Lyons v. Cunningham, 66 id. 43;
(Concurred in by Justices McKinstry and Ross.)
Barney v. Vigoureaux, 75 id. 377;
Horton v. Gallardo, 88 id. 582.

The fact of the "Beaver" being an American vessel on July 13, 1914, raises no presumption that she was such on April 12, 1914, as presumptions do not run backward.

Windhaus v. Bootz, 92 Cal. 617.

IV.

Mrs. Young testified as to the character of the underwear worn by Oliver on the night in question. Oliver's underwear was taken away from him by the jailer of Alameda County jail, and returned to him on the morning after the evidence was closed. Argument was about to be commenced, when his counsel asked permission to put him on the stand so that he could introduce the underwear in evidence. Permission was not granted (pages 46, 47), and we believe the court erred in refusing such permission. He had not known where his underwear was during the trial and his counsel, with the burden of the master and a number of officers of a steamship about to leave port on his hands,

could not be expected to find time to trace the underwear. As soon as he had information on its whereabouts he called the court's attention to the matter and could not very well do so before.

A motion for a new trial, and an arrest of judgment was duly made in this case, each of which was denied.

For the foregoing reasons, we respectfully submit the judgment should be reversed.

Dated, San Francisco,
May 15, 1915.

H. W. Hutton,
Attorney for Plaintiff in Error.